

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
EZ SACRAMENTO, INC.)	File No. 98020370
)	NAL/Acct. No. 918ed012
Licensee of Station KHTK(AM))	Facility # 20352
Sacramento, California)	
)	
INFINITY BROADCASTING)	File No. 98090215
CORPORATION OF WASHINGTON, D.C.)	NAL/Acct. No. 918ed013
)	Facility #28625
Licensee of Station WJFK-FM)	
Manassas, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 2001

Released: February 20, 2001

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement

1. In this Order, we deny an application for review filed jointly by EZ Sacramento, Inc. ("EZ"), licensee of KHTK(AM), Sacramento, California, and Infinity Broadcasting Corporation of Washington, D.C. ("Infinity"), licensee of WJFK-FM, Manassas, Virginia (jointly, "petitioners"). Petitioners seek review of a *EZ Sacramento, Inc.*, 15 FCC Rcd 18257 (Enf. Bureau 2000). In that Order, the Chief, Enforcement Bureau, denied reconsideration of two forfeiture orders, *Infinity Broadcasting Corp. of Washington, D.C.*, 14 FCC Rcd 13541 (Mass Media Bureau 1999) and *EZ Sacramento, Inc.*, 14 FCC Rcd 13539 (Mass Media Bureau 1999). Each forfeiture order imposed a \$4,000 forfeiture upon the licensee for a willful violation of section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206 (Broadcast of telephone conversations).

2. The staff properly decided the matters raised below, and we uphold the staff decisions for the reasons stated therein. In this regard, we concur fully with the Bureaus that the protection afforded by 47 C.F.R. § 73.1206 is not as limited as the petitioners would desire. Thus, when an individual is informed during a broadcast conversation that he or she is being put on hold, the prior notification that the call is being broadcast or recorded for later broadcast effectively ceases. If a licensee wishes to continue to broadcast or record for later broadcast any conversation or utterances that occur while the caller is on hold, the licensee must explicitly notify the caller of its intention to do so. While we recognize that the facts in this case are somewhat different than most cases under 47 C.F.R. § 73.1206, we believe the Bureaus' conclusions are in accord with the language and purpose of the rule and should have been anticipated by the petitioners. In this regard, the Commission has made clear repeatedly that the purpose of the rule is to afford a level of privacy to telephone conversations. *E.g., Amendment of Section 73.1206: Broadcast of Telephone Conversations*, 3 FCC Rcd 5461, 5463 (1988). The petitioners chose to disregard these pronouncements, and we reject their contention that they acted in good faith. We therefore agree with the Bureaus that the forfeitures are warranted.

3. We also disagree with Infinity's argument that its acquisition of control of EZ precludes imposition of a forfeiture upon EZ for actions occurring prior to the transfer. In addition to the reasons articulated in *EZ Sacramento, Inc.*, we note that section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, authorizes us to impose forfeitures upon any person who willfully violates the Act or our rules. That section also requires us to take into account, with respect to the violator, its degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 47 U.S.C. § 503(b)(2)(D). The facts of this case plainly reveal that EZ willfully violated 47 C.F.R. § 73.1206 and that a forfeiture is warranted against EZ. The fact that the ownership of the company changed hands does not affect the company's liability. In determining the amount of the forfeiture, we have considered, but ultimately find insignificant, the fact that Infinity acquired control of EZ after the violation occurred.

4. Accordingly, IT IS ORDERED, pursuant to authority granted by section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the application for review filed October 23, 2000, by EZ Sacramento, Inc. and Infinity Broadcasting Corporation of Washington, D.C. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

CONCURRING SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

In the Matter of EZ Sacramento, Inc. Licensee of Station KHTK(AM) Sacramento, California, Infinity Broadcasting Corporation of Washington, D.C. Licensee of Station WJFK-FM Manassas, Virginia, Memorandum Opinion and Order, FCC 01-53 (rel. February 20, 2001).

I support today's forfeiture order, nonetheless, I write separately to question the continued utility and effectiveness of FCC rules addressing privacy issues, such as this one. 47 CFR § 73.1206 provides, in pertinent part, that "[b]efore recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation." That section forms the basis of today's forfeiture. Rather than promulgated pursuant to some specific statutory directive, this provision was promulgated in 1970 based on our general statutory authority.¹

I believe the Commission should re-examine the utility of rules -- like this one -- that are not based on a specific statutory charge. Among the factors to be considered in assessing the efficacy of these rules are: the availability of remedies in other fora, the possibility of asymmetrical regulation, and the ability of the Commission to focus resources on its core mission. Here, it appears that private parties have extensive remedies under state law to cure any privacy violations. Relying on state law remedies would also place radio broadcasters on the same footing as other media outlets (i.e., newspapers) that are not subject to these privacy rules. Finally, elimination of the rule would allow the FCC to more aggressively focus its enforcement attention on those areas squarely and solely within the FCC's jurisdiction. Therefore I encourage my colleagues to take a closer look at these types of rules in upcoming biennial review proceedings. In the end, we may better serve the American people by doing fewer things, but doing them better.

¹ See In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations, *Report and Order*, Docket No. 18601, 23 F.C.C. 2d 1 (1970) (adopting 47 CFR § 73.1206 under its authority from sections 4(i) and (j) and 303(r) of the Communications Act of 1934). 47 CFR § 73.1206 provides,

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

47 CFR § 73.1206.